jury of the danger of convicting on such evidence.

3. It is also his duty to tell them that nevertheless they can legally convict on such evidence.
4. When it appears that the judge has not given the required warning, the Court of Appeal will quash the conviction.
5. One accomplice cannot corroborate another.
6. The corroboration must be evidence which implicates the accused. Evidence tending merely to show that a crime has been committed is insufficient.

Where a judge sits alone as a judge of fact as well as a judge of law, he must adequately warn himself of the danger of convicting on the uncorroborated evidence of an accomplice.

"If he ignores or disregards any of these principles, then I think it is the duty of this Court (the High Court in its criminal appellate jurisdiction) to quash the conviction, but if it appears that he has clearly present in his mind the danger of convicting on the unconfirmed evidence of an accomplice but nevertheless believes that evidence and convicts, this court will not interfere with the conviction, merely on the ground of want of corroboration,"

per Woodward Ag. C.J. in *Lim Yam Hong, supra,* pages 159-160.

In the case under appeal, the learned President had never at any moment warned himself, much less adequately or clearly, that Ramli was an accomplice, for the simple reason that he did not think he was.

The learned Deputy Public Prosecutor who responded to the appeal made, if I may without disrespect call it, a last ditch attempt to salvage the conviction. In *R.* v. *William Cyril Davies,*[4] the Court of Appeal refused to disturb a conviction based on the evidence of accomplices, where the judge in his summing up to the jury made no single mention of accomplice or corroboration. The jury acquitted the accused on four counts when the case against the accused depended entirely on the evidence of accomplices, but convicted him on the fifth count, where in addition to the evidence of the accomplices there was the evidence of a police officer who saw the envelope containing the money pass to the accused and who shortly afterwards arrested the accused with the envelope on him. It was suggested that the jury might well have thought that there was sufficient corroboration in the evidence of the detective who said he saw the envelope pass. Hewart L.C.J. said that the question before the court was whether, in the circumstances of the omission of any direction on accomplice evidence, the verdict of guilty on the fifth count amounted to a substantial miscarriage of justice, or, in other words, whether it was clear that the jury would inevitably have arrived at the same conclusion upon that count, if an express direction on the lines laid down in *Baskerville*[5] had been given. On a review of the evidence, the learned Lord Chief Justice found that "the court is satisfied that however explicit the direction on those lines had been, the jury could not have arrived at any conclusion other than that to which they came" and accordingly dismissed the appeal.

If there had been a fully explicit direction on accomplice evidence and the jury could not have nevertheless arrived at any other conclusion, the verdict would not be disturbed, even if there had been no such direction. The same Lord Chief Justice in *R.* v. *Thomas Lewis*[6] at page 113 expressed the proposition thus:

"This court has held more than once that, although the judge omits to give a proper direction, or any directions nevertheless where corroborative evidence exists in the case and is of such a convincing, cogent and irresistible character that it is apparent that the jury, if they had had a proper direction, must inevitably have come to the same conclusion, the omission is not fatal; otherwise it is."

The question in this case thus becomes whether there is corroborative evidence of a convincing cogent and irresistible character. There is indeed evidence of Ramli's visit to the appellant's office from the testimony of the chief clerk Liew and this evidence could be of such convincing character that an appellate court would act on it. But beyond this, there is no other corroborative evidence in the sense in *Baskerville,* which has been consistently adopted in our courts, of "independent testimony . . . which implicates him that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it. . . ." There is no corroboration of Yunus's accompanying Ramli to the office or the appellant. Ramli and Yunus, being accomplices, cannot corroborate one another. There is no corroboration of what transpired between Ramli and the appellant in the latter's office. In view of the admission that he first testified he was walking, not because it was the truth but at the request of Haji Yusof, the case for the prosecution, in my view, was not such that I would be prepared to uphold the conviction where the trial judge had not advised himself of the dangers of conviction on the uncorroborated evidence of accomplices. The misdirection renders the conviction unsafe.

The conviction is quashed and the sentence set aside.

Order accordingly.

Solicitors: *Wilson & Co.*

BONG GEOK BENG v. AHMAD NORDIN BIN MOHAMED AMIN & ANOR. ROSNAH BINTE KAMARUDIN v. SAMAD BIN KASSIM & ANOR. LAI KEUN BAN v. TAN SRI CHONG HON NYEN & ANOR. MOHAMED BIN BAKAR v. ABDUL RASHID BIN OTHMAN & ANOR.

[O.C.J. (Wan Yahya J.) December 28, 1978]

[Melaka — Election Petitions Nos. 1, 12, 13 & 14 of 1978]

Elections — Election Petition — Motion to dismiss petition — Uncontested election — When election takes place — Wrong date given in petition — Insufficiency of security for costs — Number of charges — Failure to specify charges — Election (Conduct of Elections) Regulations, 1959, regs. 7, 10, 12 — Election Offences Act, 1954, ss. 32 and 34.

In this case a number of election petitions had been brought alleging that the returning officer had wrongly rejected the nominations of the petitioners and had declared the return

of the other candidates unopposed. In the election petitions the date of the election was wrongly given as the date of the Parliamentary and State elections instead of the date when the first respondents were declared returned unopposed. The charges alleged in the petition were not stated with sufficient particularity and did not state what provisions of the law on which non-compliance was alleged to have taken place.

Held: (1) as the petitioners had recited the wrong date of election, they were not entitled to the reliefs prayed for in the petition. The elections in the particular constituencies took place on June 21, 1978 when the unopposed candidates were so declared returned;

(2) section 32 of the Election Offences Act, 1954, requires the petitioner not only to state specifically in his petition which provisions of the law on which non-compliance is alleged to have taken place but also to supply adequate information as to how the respondent is said to have offended that law. In these cases the petitions were defective for want of specific charges.

Cases referred to:-

(1) *Abu Bakar* v. *Mohamed Zain* [1967] 1 M.L.J. 168.

(2) *Devan Nair* v. *Yong Kuan Teik* [1967] 1 M.L.J. 261, 264.

(3) *Tengku Korsiah* v. *Mohamed bin Jusoh* [1970] 1 M.L.J. 6.

(4) *Hugh Siak Meng & Anor.* v. *Daing Ibrahim bin Otiman*

(5) *Norbert Choong Kai Chong & Anor.* v. *Mohamed Idris bin Haji Ibrahim,* Election Petition Nos. 2 & 3 of 1978.

(6) *Othman bin Haji Mohamed Marzuki* v. *Baharom bin Haji Bakar & Anor.,* Election Petition No. 10 of 1978.

(7) *Yau Sze* v. *Election Commission & Anor.,* Election Petition No. 1 of 1978.

ELECTION PETITION.

Karpal Singh for the petitioners.

Chan Yew How for the 1st respondent.

Datuk Mohamed Yusuf bin Abdul Rashid (Senior Federal Counsel) for the 2nd respondent.

Cur. Adv. Vult.

Wan Yahya J.: This is a motion by the petitioners seeking leave of the court to amend their petitions.

For the purpose of proceedings herein and this judgment the term 'petitioners' refer to Bong Geok Beng in Election Petition No. 1/78, Cik Rosnah binte Kassim in Election Petition No. 2/78, Lai Keun Ban in Election Petition No. 3/78 and Mohamed bin Bakar @ Che Mat bin Bakar in Election Petition No. 4/78; the term 1st respondent refers to Encik Azizi bin Mohd. Ariffin in all the four cases; and the term 2nd respondent refers to Encik Ahmad Nordin bin Md. Amin in Election Petition No. 1/78, Encik Samad bin Kassim in Election Petition No. 2/78, Chong Hon Nyan in Election Petition No. 3/78 and Abdul Rashid bin Othman in Election Petition No. 4/78.

The petitioners had filed their petitions on September 7, 1978 in which they sought *inter alia* for an order that the election held on July 8, 1978 be declared null and void and that the declaration forms submitted by them were valid. On November 6, 1978 the petitions were mentioned before this court and the hearing fixed for today. Two days following this the 1st respondent filed the motions seeking for an order to dismiss the petitions and they were fixed on December 2, 1978. Barely four days before the scheduled hearing the petitioners filed this motion for leave to amend.

In their affidavits the petitioners claimed firstly that after the presentation of the petitions in July 1978 they came to know that the date "July 8, 1978" appearing in paragraph 1 of the title of the petition and paragraph 4 of the petition is factually incorrect and has been inadvertently inserted and sub-paragraphs 1(a) and 1(b) of the petition are also factually incorrect and inadvertently inserted.

At the earlier hearing before this court two matters of law were raised by the parties. The first of which relates to the capacity in which I was sitting to try this case and application and the second relates to the application itself.

On the first issue all parties must have been aware that I have fixed not only the hearing of the Election Petition but also the notices of motion by the respondents as well as the applicants to amend on the same date, i.e. December 6, 1978. It has been my intention all along to treat the petitions and all matters or proceedings arising out of them as one case. After all, an Election judge is especially equipped with the powers over and above a High Court judge for the specific purpose of enabling him to deal with election cases. So I do not see any reason why he should not be cloaked with similar powers when hearing any part of the petition, be it interlocutory in nature. Subsection (4) of section 33 of the Election Offences Act, 1954, to my mind, is intended to enable High Court judges to dispose of interlocutory matters speedily when Election judges are not readily available so that justice may not be adversely affected by statutory provisions requiring compliance within a certain time. I see no justification for suggesting that I am sitting here in the capacity and exercising any powers other than those of an Election judge.

So much for the first issue. On the second matter, i.e. the motion to amend the petition, parties have quoted numerous authorities, both judicial precedents and statutory. Mr. Karpal Singh for the petitioners relies heavily on the case of *Abu Bakar* v. *Mohamed Zain*[1] wherein Mr. Justice Yong entertained a motion to amend the Election petition at the late stage where hearing of the petition had already commenced. It was pointed out to me that in that case the learned judge had in fact applied Order 28 rule 1 and rule 12 in determining whether the amendment should be granted. Counsel for the 2nd respondents and the learned Senior Federal Counsel, on the other hand, urged the court not to allow the amendment and they cited numerous cases in support of their arguments. It was also submitted by the learned Senior Federal Counsel that the case of *Abu Bakar* v. *Mohamed Zain, supra,* was wrongly decided and that since that decision there has been a clear tendency of the courts to apply the provisions of the Election laws strictly. The prerogative of determining the correctness or otherwise of High Court decisions lies with the court above. For the purpose of deciding this issue I shall confine myself only to the question whether that judgment is sufficiently persuasive to move this court into applying it in the present case. I am inclined to believe that amendment under Order 28 rules 1 & 12 was considered in that case because the requirements of section 38(2) of the Election Offences Act, 1954 were not

raised then. Before this court the effect of this section was taken up and strenuously argued by the learned Senior Federal Counsel. Now subsection (2) of section 38 of the Election Offences Act reads:

"(2) An election petition presented in due time may, for the purpose of questioning the return or the election upon an allegation of a corrupt or illegal practice, be amended with the leave of a judge of the High Court within the time within which an election petition questioning the return or the election upon that ground may be presented."

My understanding of this subsection is that the time-limit for filing an amendment is the same as that for filing the petition itself. It may be argued that, if such is the case, there is no purpose of having this section at all. That argument is not altogether correct. The object of section 38(2) is to allow a petitioner, who has filed his petition earlier than the statutory requirement, as in this case 21 days after the gazetted results, to apply for any amendment to his petition at any time up to the date when the statutory requirement of 21 days ends. To illustrate this point further, in our present case the results were gazetted on August 17, 1978. The petitioner's right to present his petition therefore is restricted within the period commencing from that date until 21 days afterwards. In this case he filed his petition on September 7, 1978 which means that he has filed it exactly on the last day of that period within which he could file his petition. So his right to amend had ended on that day itself. Had he filed it earlier, say the day immediately after the *Gazette*, then he would have 20 days within which to amend.

The rationale behind this rule is not too difficult to comprehend. The respondent in our Election Petitions have a right to be informed what the charges were against him. Once having been informed of the charges, he has to be given time to collect his evidence, while they are still fresh and available, and prepare his case. An amendment, if allowed at this stage, would involve alteration or addition to the existing charges and even raise new grounds for petitioning. This may well amount to a new petition being filed so that its acceptance by the court would be tantamount to allowing the petitioner to file his petition outside the statutory period of 21 days as prescribed by section 38(1) of the Election Offences Act, 1954. I find support for this contention from the very case cited and relied upon by Mr. Karpal Singh, in particular at page 169 where Yong J. said:

"In the present case by allowing the petitioner to amend... would in effect amount to permitting him to file a fresh petition out of time and thus depriving his opponent of the benefit of the period of limitation under section 38 of the Election Offences Ordinance, 1951 and thereby causing him an injury which cannot be compensated by costs."

Another matter to be considered is whether section 38(2) is in its application mandatory. It is noticeable that this subsection of the Election Act is almost identical in nature and purpose as that of rule 15 of the Election Rules, 1954. Both pertain to procedure and prescribed time. In the case of *Devan Nair* v. *Yong Kuan Teik*[2] the Privy Council held that the rule was mandatory and the petitioner's failure to comply with it rendered the proceedings a nullity. Again very much to our point in issue is the case of *Tengku Korish* v. *Mohamed bin Jusoh*,[3] where it was held:

"in view of the peremptory language of section 38(1) of the Act, the petitioners should have filed their petitions within 21 days after the date of publication of the election results in the Gazette and as the petitions in this case were filed before the publication of the results, they must be dismissed."

This decision has clearly stood the test of time and has been applied over and over again by my learned brothers Hashim Yeop Sani J. in the case of *Hugh Siak Meng & Anor.* v. *Daing Ibrahim bin Othman*;[4] Harun J. in the case of *Norbert Choong Kai Chong & Anor.* v. *Mohd. Idris bin Haji Ibrahim & Anor.*;[5] Syed Agil Barakbah J. in the case of *Othman bin Haji Mohamed Marzuki* v. *Baharom bin Haji Bakar & Anor.*;[6] and by Raja Azlan Shah F.J. himself in *Yau Sze* v. *Election Commission & Anor.*[7]

As Lord Upjohn so aptly described in *Devan Nair's* case, *supra,* at page 264, one of the matters considered by their Lordships of the Privy Council in determining whether the rule was mandatory or directory was "the need in an election petition for a speedy determination of the controversy." Such determination cannot be obtained if amendments are to be freely given. Any right to amend the petition will only give rise to reciprocal right to respondents to amend their motions. A petition cannot be sustained by a trial and error method in court with the petitioner changing course of action whenever confronted by viable opposition. To allow this infringement of mandatory procedure is tantamount to opening a new horizon for "trial and error" litigation which can go on *ad infinitum.*

In a more colloquial language this election trial is like a card game; at the expected time each player has to place his cards on the table so as to determine his position in accordance with the rules of the game. Once the cards are on the table no change of mind is tolerated. If allowed, it will not only prevent proper determination of the game but will precipitate confusion and chaos.

For a peaceful and speedy determination of an election petition the rules have to be strictly adhered to and obeyed. Otherwise it will end in the same manner as a game involving the indecisive gambler.

As the present application is not made within the prescribed period under section 28(2) of the Election Offences Act, 1954 I have to disallow it. I accordingly refuse leave of motion to amend by the petitioner and rule that this hearing proceeds on the original petition as filed.

Order accordingly.

Solicitors: *Karpal Singh & Co.; Allen, Gledhill & Ball.*